

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 JOSEPH F. CACCIOLA, JR.,

12 Plaintiff,

13 vs.

14 HELGREN'S OCEANSIDE
15 SPORTFISHING TRIPS, INC.,

16 Defendant.

CASE NO. 15cv2141-LAB (JMA)

ORDER DENYING *EX PARTE*
APPLICATION FOR TEMPORARY
RESTRAINING ORDER; AND

ORDER REQUIRING SERVICE AND
BRIEFING

17
18 On September 25, 2015, Plaintiff filed his verified complaint, bringing contract claims
19 in admiralty. On the same day, he also filed an *ex parte* application for a temporary
20 restraining order. The application makes clear Defendant had not yet been served, although
21 Plaintiff intended to do so immediately.

22 The complaint and application show that the underlying contract dispute has been
23 ongoing for some time, and was being litigated in state court. The complaint says Plaintiff
24 filed suit in state court on September 14 seeking essentially the same relief as in this case,
25 but "[g]iven that the matter will be heard in Federal Court, the state court case is being
26 dismissed." (Compl., ¶ 28.)

27 TROs are for emergencies only, and a party must clear a high hurdle before one is
28 granted. See *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 438
(1974). See also Fed. R. Civ. P. 65(b)(1)(A) (movant must "show that immediate and

1 irreparable injury, loss, or damages will result to the movant before the adverse party can be
2 heard in opposition").

3 A delay in seeking relief weighs against its being found to be a true emergency. The
4 Ninth Circuit has held that delays in seeking relief should be considered when determining
5 whether preliminary injunctive relief should be granted. *See Miller ex rel. NLRB v. Cal. Pac.*
6 *Med. Ctr.*, 991 F.2d 536, 544 (9th Cir. 1993) ("Plaintiff's long delay before seeking a
7 preliminary injunction implies a lack of urgency and irreparable harm.") (internal quotation
8 marks and citation omitted); *Lydo Enterprises v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th
9 Cir.1984) ("A delay in seeking a preliminary injunction is a factor to be considered in weighing
10 the propriety of relief.") The fact that Plaintiff waited until quite late to file the application
11 weighs against its being granted *ex parte*.

12 What is more, it is unclear whether the state court is still adjudicating Plaintiff's claims.
13 It may be that that court is in a position to offer Plaintiff temporary protection. And finally,
14 Plaintiff has not shown that other comparable docking facilities are unavailable to him. If they
15 are, it would seem Plaintiff is not facing irreparable injury.

16 The Court will therefore not grant the temporary restraining order *ex parte*. Instead,
17 Plaintiff must either file a renewed motion for preliminary injunctive relief or file a
18 supplemental memorandum of points and authorities, not longer than five pages. Whichever
19 he chooses to file must show why relief is unavailable in state court, give the status of any
20 state court proceedings, and explain whether any comparable docking facilities are available
21 to him. He must also serve Defendant with process, and also with a copy of this order, and
22 file proof of service.

23 **Within seven calendar days of the date proof of service is filed**, Defendant shall
24 file a response, not to exceed fifteen pages (not counting any appended or lodged material)

25 ///

26 ///

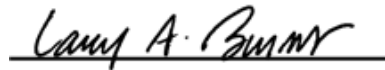
27 ///

28 ///

1 showing why preliminary injunctive relief should not be granted. The Court will then set a
2 hearing if appropriate.

3 **IT IS SO ORDERED.**

4 DATED: September 28, 2015

5 

6 **HONORABLE LARRY ALAN BURNS**
7 United States District Judge
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28